**CORRECTED COPY**



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-681

WILLIAM ROBERT NOLTE,
Petitioner,

v.

THE BUDD COMPANY,
Respondent.

## RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COLOMBO AND COLOMBO
By: LOUIS J. COLOMBO, JR. (P12085)
LAWRENCE F. RANISZESKI (P23939)
Attorneys for Respondent
The Budd Company
1500 N. Woodward, Suite 209
Birmingham, Michigan 48011
(313) 645-9300

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

**Cases:**

**IN THE**

# Supreme Court of the United States

**OCTOBER TERM, 1978**

**No. 78-681**

**WILLIAM ROBERT NOLTE,**
**Petitioner,**

**v.**

**THE BUDD COMPANY,**
**Respondent.**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Budd Company respectfully prays that this Honorable Court deny the Petitioner's request for the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

While the Petitioner has appended to his Petition copies of two (2) of the Orders of the Sixth Circuit Court of Appeals and supplementally appended the Memorandum Opinion and Order Denying Plaintiff's Motion to Compel Discovery, Granting Defendant's Motion to Vacate Notice of Taking Deposition, and Granting Defendant's Motion for Summary Judgment entered by the United States District Court on December 27, 1977, he has failed to append to his Petition as required under U.S. Sup Ct Rule 23(1) (i), 28 U.S.C.A. copies of the Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment entered by the Honorable Fred W. Kaess, United States District Judge on January 16, 1976; the District Court's Judgment of Dismissal entered January 16, 1976; the Order of the Sixth Circuit Court of Appeals dated May 24, 1977 vacating the District Court's Decision and remanding the matter for reconsideration after reasonable discovery had been conducted; the Judgment of the United States District Court Dismissing this action entered on December 27, 1977; the Order filed by the United States Court of Appeals for the Sixth Circuit on June 13, 1978 correcting typographical errors on the Order entered on June 7, 1978; the Memorandum Opinion of the Honorable Fred W. Kaess, United States District Judge dated September 7, 1978 denying Plaintiff's Motion for Extension of Time to File Appeal, denying Defendant's Motion for Attorneys' Fees, and granting Defendant's Motion for Costs and the Order entered consistent with the Court's Memorandum Opinion on September 7, 1978. (The Petitioner took no appeal from that portion of the Order which denied his Motion for Extension of Time to File an Appeal.) Accordingly, the Respondent has appended to its Brief the aforesaid Opinions and Orders (App. A — G, infra, pp. A1 — A16).



## COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit abused its discretion in dismissing Petitioner's Appeal for lack of jurisdiction where Petitioner failed to timely file a Notice of Appeal within the time prescribed by F.R.A.P. Rule 4(a), 28 U.S.C.A.?

## COUNTER STATEMENT OF RULE TO BE CONSTRUED

Contrary to the assertion of the Petitioner, Respondent maintains that this Honorable Court is being requested to construe the following provisions of the Federal Rules of Appellate Procedure.

Rule 4(a)

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of

appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

* * * *

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

## COUNTER STATEMENT OF THE CASE

Since the Petitioner has made misleading and inaccurate statements to this Court, not supported by the record, Respondent is compelled to submit this brief Counter Statement of the Case.

Neither the District Court docket entries nor the Order of the United States Court of Appeals for the Sixth Circuit dated June 7, 1978 support Petitioner's assertion that a Notice of Appeal was mailed to the Court of Appeals and filed with the District Court within the thirty (30) day time period allowed for filing a Notice of Appeal under Rule 4(a) of the Federal Rules



of Appellate Procedure. In fact, a review of the District Court docket entries reveals that Petitioner's Notice of Appeal was docketed on February 8, 1978, after the thirty (30) day time period had elapsed. Furthermore, on Page 2 of his Brief in Opposition to the Motion to Dismiss the Appeal for Lack of Jurisdiction filed in the United States Court of Appeals for the Sixth Circuit, Petitioner admits that he "has no proof" of such alleged filing, since the docket entries for the Federal District Court do not reflect the Notice of Appeal having been filed with the District Court within the required thirty (30) day period. Respondent therefore submits that since the Petitioner has admitted that the docket entries do not indicate that a Notice of Appeal was filed within thirty (30) days, then for purposes of this Petition for Writ of Certiorari, Petitioner's statement that a Notice of Appeal was timely filed within the thirty (30) day period is not only totally inaccurate but misleading.

The same is true with respect to Petitioner's alleged filing of an Appeal Bond with the District Court. Contrary to Petitioner's contention that an Appeal Bond was filed with the District Court, the Sixth Circuit Court of Appeals in its Order dated June 7, 1978 clearly stated that:

> "The record before us *does not indicate nor does counsel state that counsel sought to have the district court file the document*, construe it as a notice of appeal or enlarge the notice of appeal period on grounds of excusable neglect pursuant to Rule 4(a), Federal Rules of Appellate Procedure." (Emphasis Added)

## REASONS FOR DENYING THE PETITION

Contrary to the claim made by the Petitioner, the decision of the Sixth Circuit Court of Appeals in the present case is not in conflict with the decision of the Fifth Circuit Court of Appeals in *Richey* v *Wilkins*, 335 F2d 1 (CA 2, 1964) nor with the decision of any other Court of Appeals on the same matter. Since the decision of the Sixth Circuit Court of Appeals is consistent with prior decisions of this Court and other Court of Appeals' decisions, this cause should not be reviewed by this Honorable Court.

It is settled law that the timely filing of a Notice of Appeal is a jurisdictional prerequisite to perfection of such appeal. *Lindsey* v *Perini*, 409 F2d 1341 (CA 6, 1969); *Boggs* v *Dravo Corp*, 532 F2d 897 (CA Pa. 1976); *Lashley* v *Ford Motor Company*, 518 F2d 749 (CA Ga. 1975); *United States* v *Hoye*, 548 F2d 1271 (CA 6, 1977). This Honorable Court recently reaffirmed this principle in *Browder* v *Director, Department of Corrections*, — US —, 54 L Ed 2d 521, 531, 98 S Ct— (1978) when it stated:

> "Under Rule 4(a) of the Federal Rules of Appellate Procedure and 28 USC § 2107 [28 USCS § 2107], a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is 'mandatory and jurisdictional.' United States v Robinson, 361 US 220, 229, 4 L Ed 2d 259, 80 S Ct 282 (1960). See also Fallen v United States, 378 US 139, 12 L Ed 2d 760, 84 S Ct 1689 (1964); Coppedge v United States, 369 US 438, 442, 8 L Ed 2d 21, 82 S Ct 917 (1962); United States v Schaefer Brewing Co., 356 US 227, 2 L Ed 2d 721, 78 S Ct 674, 73 ALR 2d 235 (1958); Matton Steamboat Co.v Murphy, 319 US 412, 415, 87 L Ed 1483, 63 S Ct 1126 (1943); George v Victor Talking Mach. Co., 293 US 377, 379, 79 L Ed 439, 55 S Ct 229 (1934). The purpose of the rule is clear: it is 'to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are free of the appellant's demands. Any other construction of the statute would defeat its purpose.' Matton Steamboat, supra, at 415, 87 L Ed 1483, 63 S Ct 1126."



Pursuant to *Browder*, there is no question that in the instant case the Sixth Circuit Court of Appeals did not abuse its discretion in dismissing this cause for lack of jurisdiction since the Petitioner failed to timely file a Notice of Appeal. The District Court's judgment was docketed on January 5, 1978. Pursuant to F.R.A.P. Rule 4(a), Petitioner was required to file in the District Court a Notice of Appeal within thirty (30) days from that date, or in this case, February 6, 1978. Petitioner's Notice of Appeal was not filed with the District Court until February 8, 1978, after the thirty (30) day period had expired. Therefore, since the thirty (30) day period for taking an appeal is "mandatory and jurisdictional", *Browder*, supra, the Sixth Circuit Court of Appeals did not abuse its discretion in dismissing Petitioner's Appeal for lack of jurisdiction.

After completely misstating the facts concerning his alleged filing of an Appeal Bond, Petitioner cites *Richey* v *Wilkins*, supra, and *O'Neal* v *United States*, 272 F2d 412 (CA 5, 1959) in support of his position that his Appeal

should not have been dismissed by the Sixth Circuit Court of Appeals. Petitioner's reliance on these cases is totally misplaced since both *Richey* and *O'Neal* are totally distinguishable from the case at bar.

*Richey* involved an appeal taken from a lower court denial of the Plaintiff's Application for Leave to Proceed with his civil rights suit *in forma pauperis*. Contrary to the facts of this case, in *Richey*, the appellant *did file* a Notice of Appeal within the thirty (30) day period, but such notice was mistakenly filed with the Court of Appeals rather than the District Court. Since the appellant in *Richey* did file a Notice of Appeal and further, since the appellant was an indigent lay prison inmate unfamiliar with the procedural requirements regarding appeals from District Courts, the Second Circuit Court of Appeals determined that it would hear and decide appellant's appeal despite his failure to comply with the letter of the Court Rules. However, the Court noted on Page 5 of its Opinion that its decision was consistent with "the liberal view which federal Courts have taken of *papers indigent and incarcerated defendants have filed* purporting to be notices of appeal." (Emphasis Added)

Clearly, *Richey* has no application to the case at bar since the Court records and docket entries indicate that this Petitioner *did not file* a timely Notice of Appeal in any court. Furthermore,unlike the appellant in *Richey*, the Petitioner in the case at bar was represented by experienced counsel who was familiar with the requirements of the Federal Rules of Appellate Procedure.



Likewise, *O'Neal* v *United States*, supra, has no application to the case at bar. In *O'Neal*, the criminal defendant's appeal from his judgment of conviction had been dismissed upon the ground that no Notice of Appeal had been filed with the Court clerk of the District Court within the time prescribed by the Court Rules. The Fifth Circuit Court of Appeals subsequently vacated its judgment of dismissal and reinstated the appellant's appeal when it later determined that the appellant had filed an Appeal Bond with the District Court *within the time required* to file an appeal. That Court held that the recitals of the bond were entirely adequate to be accepted as a Notice of Appeal under the Court Rules and to vest that Court with jurisdiction. *O'Neal* is distinguishable from the present case for the simple reason that the court records and docket entries in this case clearly reveal that the Petitioner *did not file* an Appeal Bond within the thirty (30) day period prescribed by F.R.A.P. Rule 4(a). The docket entries clearly reveal that Petitioner's Appeal Bond was filed in the District Court on February 8, 1978, after the appeal period had run. Accordingly, *O'Neal* does not apply to this case.

In support of its position that the Sixth Circuit Court of Appeals did not abuse its discretion in dismissing Petitioner's Appeal, Respondent would refer this Honorable Court to *United States* v *Temple*, 372 F2d 795 (CA 4, 1966). In that case, the criminal defendant contended that his oral notice of appeal in open court

constituted filing of his Notice of Appeal required to be filed within ten (10) days after entry of judgment. In rejecting that contention, the Court stated at Page 799:

> "Rather, we hold that the case before us does not present a situation in which such notice can be considered adequate. The defendant is an attorney and was represented during the trial by retained counsel. He was free under bond during and after the trial. *Furthermore, he had, with assistance of the same counsel who gave oral notice of appeal in the present case, perfected a prior appeal to this Court in this same cause. If the Rule is to be applied at all, it should be applied in this case. We therefore dismiss the appeal because notice was not timely filed in compliance with Rule 37(a).*" (Emphasis Added)

This sound principle has equal application to the case at bar. Petitioner was represented by experienced counsel who was familiar with the requirements of the Federal Rules of Appellate Procedure. Indeed, as in *Temple*, the Petitioner had, with assistance of the same counsel, perfected a prior appeal to the Sixth Circuit Court of Appeals *in this same cause* (Court of Appeals Docket No. 76-1597). As in *Temple*, if the Rule is to be applied at all, it should be applied in this case. Respondent respectfully urges this Court to affirm the Sixth Circuit Court of Appeals' Dismissal of this Appeal because notice was not timely filed in compliance with the Federal Rules of Appellate Procedure.



Finally, though reference to same has been completely omitted by the Petitioner, Respondent would point out to this Honorable Court that on three (3) separate occasions the Petitioner made requests to the Sixth Circuit Court of Appeals and the United States District Court for the Eastern District of Michigan for an extension of time to file his Appeal on the grounds of excusable neglect. Petitioner's first request was contained in his March 22, 1978 Brief in Opposition to Respondent's Motion to Dismiss the Appeal for Lack of Jurisdiction. His second request was contained in his Petition for Re-Hearing En Banc before the United States Court of Appeals for the Sixth Circuit. On both occasions, the United States Court of Appeals for the Sixth Circuit denied Petitioner's request. Despite those denials, the Petitioner subsequently moved for an extension of time to file his Appeal before the United States District Court for the Eastern District of Michigan. That Court on September 7, 1978 denied Petitioner's Motion and in the course of doing so, pointed out that the United States Court of Appeals for the Sixth Circuit had twice rejected identical requests by the Petitioner (App. G, infra, p. A17). Respondent submits these facts to this Court to clarify the record and advise this Court that the issues presented by the Petitioner have been presented on three (3) separate occasions before the lower courts and have been thrice denied.

## CONCLUSION

The decision of the Sixth Circuit Court of Appeals in the present case is consistent with similar decisions of other Courts of Appeals on the same matter and with this Court's recent decision in *Browder*. Therefore, since the Sixth Circuit Court of Appeals did not abuse its discretion in dismissing Petitioner's appeal for lack of jurisdiction, this Honorable Court should deny this Petition for Writ of Certiorari.

Respectfully Submitted,

COLOMBO AND COLOMBO
By: LOUIS J. COLOMBO, JR. (P12085)
LAWRENCE F. RANISZESKI (P23939)
*Attorneys for Respondent*
*The Budd Company*
1500 N. Woodward, Suite 209
Birmingham, Michigan 48011
(313) 645-9300

Dated: November 14, 1978



## APPENDIX A

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: January 16, 1976

(William Robert Nolte, Plaintiff v. The Budd Company, Defendant — No. 5-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Defendant seeks dismissal, or in the alternative, summary judgment of plaintiff's complaint, pursuant to Rules 12(b) (6) and 56 of the Federal Rules of Civil Procedure. Plaintiff's complaint seeks declaratory, injunctive, and equitable relief based on an alleged improper discharge in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq.

A brief review of the facts is necessary to an understanding of the issues present here. In December, 1974, the plaintiff had been employed by the defendant in excess of ten years as a registered patent agent under the title, "Office Manager and Foreign Liaison Coordinator." The plaintiff was not an attorney. Previously, in 1972, a corporate decision had been made to reorganize the defendant company. This decision included the creation of a Legal Department, which

would include the former Patent Department, and a moving of the General Offices of the company from Philadelphia, Pennsylvania to Troy, Michigan. An offer of relocation and employment was made to, and accepted by, the plaintiff. Not all employees were offered the option of employment and relocation.

During December, 1974, Mr. Thomas I. Davenport, Corporate Counsel for the defendant, was advised that due to the current industry-wide depressed economic situation, immediate reductions in optional activities and operating expenses would be necessary. On evaluation, it was determined that the position held by the plaintiff was not an essential one, and would, therefore, be eliminated. On December 13, 1974, the plaintiff was advised that he would be placed on a furlough status effective January 20, 1975. Plaintiff was 56 years old at this time.

Plaintiff asserts, by affidavit, that when advised of the elimination of his position, he was told that "he had reached a plateau" with the defendant company. He has also submitted a roster of corporate management personnel which includes the respective ages of those employees. It is further contended that the functions previously performed by the plaintiff are now being performed by a younger attorney on the legal staff.

In response, defendant contends that the elimination of the position of the plaintiff was dictated by purely economic reasons. Defendant denies that any statements about a "plateau" were made to the plaintiff. It is also submitted that the roster was prepared in 1971 in anticipation of a move to Detroit, for the purpose of determining those employees who might be near retirement and, therefore, not interested in relocation.



Finally, defendant points out that the person who assumed a portion of the former duties of the plaintiff was an attorney who had been with the defendant for ten years, who is only slightly more than one year younger than the plaintiff,[1] and who has been consistently more highly rated in his job performance.

Section 4(a) (1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1) provides as follows

> It shall be unlawful for an employer —
>
> > to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

As with any restriction of this type, legitimate exceptions to the general rule are recognized. Section 4(f) (1) of the Act, 29 U.S.C. § 623(f) (1) provides

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> > to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

---

[1] It is not disputed that a part of plaintiff's former duties are being performed by an outside data processing company.

The purpose of the Act is to promote the employment of older persons in the general economy, and to prevent the exercise of arbitrary and discriminatory practices on that class. *Hodgson* v. *First Federal Savings & Loan Association of Broward County, Fla.*, 455 F.2d 818 (5th Cir. 1972); *Brennan* v. *Reynolds & Co.*, 367 F. Supp. 440 (N.D. Ill. 1973).

In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the Court set forth the requirements "of establishing a *prima facie* case of racial discrimination" under Title VII of the Civil Rights Act of 1964, 78 Stat. 253. The Court noted that

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (Footnote omitted).

*McDonnell, supra,* at 802. The case presently before the Court is not an action under Title VII. However, both the language and intent of Title VII bear a great deal of similarity to that found in the Age Discrimination Act. *See, Laugesen* v. *Anaconda Company*, 510 F.2d 307, 312 (6th Cir. 1975); *Wilson* v. *Sealtest Foods Division of Kraftco Corp.*, 501 F.2d 84, 86 (5th Cir. 1974). The analogy between the two, while not perfect, does suggest comparison. *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 94 (8th Cir. 1975), is distinguishable from the case at bar in that it involved a discriminatory refusal to



hire, and not a discharge. In *Potter* v. *Goodwill Industries of Cleveland*, — F.2d — (6th Cir., July 18, 1975), the Court noted that

> . . . in order to make out a prima facie case of discriminatory discharge, a Title VII plaintiff must show only that he is a member of a class entitled to the protection of the Civil Rights Act, that he was discharged without valid cause, and that the employer continued to solicit applications for the vacant position.

Considering the factors set forth in both *McDonnell* and *Potter*, it seems fair to say that the initial burden on the plaintiff, in a case of age discrimination, would require a showing that he is a member of the class entitled to the protection of the Act,[1] that he was discharged without valid cause, and that he was replaced by a younger person. Cf., *Wilson, supra*, at 86.

In this respect, the Court sees two defects in the case of the plaintiff. First, the affidavits submitted by the defendant establish without dispute that the elimination of the position held by the plaintiff and his subsequent placement on furlough status were the result of corporate decisions to reduce the work force. This decision resulted in a reduction in the general work force from 20,877 to 15,234 employees and a reduction in the company's Legal Department work force from eight to six persons (Davenport Affidavit, p. 6).

---

[1] Ages 40-65. 29 U.S.C. § 631.

Secondly, while the person who replaced the plaintiff is admittedly slightly younger, this does not necessarily give rise to the presumption that age discrimination was utilized in discharging the older employee.[1] Also,

---

[1] As stated by the Court in Laugesen v. Anaconda Company, 510 F.2d 307 (6th Cir. 1975), at 313, n. 4

> It is also evident from the Report, that Congress did not desire that the Act be applied formalistically:
>
> > 'The case by case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.'
>
> The foregoing language suggests that perhaps the more strict approach which is evident in the treatment of a Title VII race discrimination case in McDonnell Douglas v. Green may not be desirable here. The progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex and national origin. Thus, while the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, *we do not believe that Congress intended automatic presumptions* to apply *whenever a worker is replaced by another of a different age.*

(Emphasis added).



as indicated previously, the replacement had consistently been more highly rated in job performance, had been with the company an approximately equal amount of time, and was an attorney (Davenport Affidavit, p. 5). Plaintiff points out that, as a registered patent agent, he was able to practice before the United States Patent Office in the same manner as an attorney. This, however, ignores the fact that an attorney is able to perform many tasks and functions which are outside the scope of a registered patent agent.

The Court recognizes that summary judgment in any case must be approached with a great deal of caution. *Tee-Pak* v. *St. Regis Paper Co.*, 491 F.2d 1193, 1196 (6th Cir. 1974); *S. J. Grove & Sons* v. *Ohio Turnpike Commission*, 315 F.2d 235 (6th Cir. 1963). Yet where there is no genuine issue of material fact, such a remedy is appropriate. *Brennan* v *Reynolds & Co.*, 367 F.Supp. 440, 442 (N.D. Ill. 1973).

For the reasons set forth above, IT IS ORDERED that Defendant's Motion for Summary Judgment be, and hereby is, granted.

/s/ Fred W. Kaess
United States District Judge

## APPENDIX B

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: January 16, 1976

(William Robert Nolte, Plaintiff, v. The Budd Company, Defendant — No. 5-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Defendant's Motion for Dismissal or, In the Alternative, for Summary Judgment, having been duly considered, and a decision having been rendered in a Memorandum Opinion and Order of even date herewith;

IT IS ORDERED and ADJUDGED that the case be dismissed.

/s/ Fred W. Kaess
United States District Judge



## APPENDIX C

ORDER

(United States Court of Appeals
For the Sixth Circuit)

Dated: May 24, 1977

(William Robert Nolte, Plaintiff-Appellant, v. The Budd Company, Defendant-Appellee — No. 76-1597)

BEFORE: CELEBREZZE and LIVELY, Circuit Judges; and RUBIN* District Judge

Plaintiff William Robert Nolte appeals from summary judgment granted to defendant The Budd Company in an action wherein he asserted violation of the Age Discrimination in Employment Act (29 U.S.C. § 621, et seq). Defendant responded to plaintiff's complaint by the filing of a motion to dismiss or in the alternative for summary judgment supported by affidavit. A counter affidavit was filed by the plaintiff and during the

---

* The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

pendency of the motion, plaintiff filed interrogatories and notices of an intention to take depositions. The defendant refused to submit to discovery during the pendency of his motion and plaintiff's motion to compel discovery was not ruled upon.

While no opinion is expressed as to the merits of plaintiff's case, he should be given an opportunity to conduct reasonable discovery in support of his claims. As this Court noted in *Senter* v. *General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), proof of overt discrimination is seldom direct. In acknowledging the value of statistical evidence in establishing a prima facie case of discrimination we stated:

> An employee is at an inerent disadvantage in gathering hard evidence of employment discrimination, particularly where the discrimination is plant-wide in scope.

532 F.2d at 527.

These considerations are equally applicable to the need for discovery prior to disposition of an employee's claims by summary judgment.

The decision of the District Court in granting summary judgment is hereby VACATED and this matter is hereby REMANDED for reconsideration after plaintiff has conducted reasonable discovery.

Entered by Order of the Court

/s/ John P. Hehman
Clerk



## APPENDIX D

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: December 27, 1977

(William Robert Nolte, Plaintiff, v. The Budd Company, Defendant — No. 5-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Defendant's Motion for Reconsideration of Summary Judgment having been duly considered, and a decision having been rendered in a Memorandum Opinion and Order of even date herewith;

IT IS ORDERED and ADJUDGED that the case be dismissed.

/s/ Fred W. Kaess
United States District Judge

## APPENDIX E

ORDER

(United States Court of Appeals
For the Sixth Circuit)

Dated: June 13, 1978

(William Robert Nolte, Plaintiff-Appellant v. The Budd Company, Defendant-Appellee — No. 78-1126)

The following typographical errors on the order entered herein on June 7, 1978 are corrected as follows: the first word of paragraph three is corrected to read "Appellant." The fourth word of paragraph four is corrected to read "appellant."

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk



## APPENDIX F

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: September 7, 1978

(William Robert Nolte, Plaintiff, v. The Budd Company, Defendant — No. 75-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Plaintiff comes before this Court on a motion for extension of time to file an appeal on the basis of undue hardship. Defendant answers and requests that attorneys' fees and costs be taxed against plaintiff and his attorneys in an amount of no less than $15,000.00 on the grounds that this lawsuit is groundless, meritless, and vexatious.

This Court has no authority to grant plaintiff's motion for extension of time to file an appeal. The United States Court of Appeals for the Sixth Circuit has twice rejected identical requests by the plaintiff. *See, Reynolds Spring Co.* v. *L. A. Young Industries, Inc.*, 101 F.2d 257 (6th Cir. 1939). Moreover, the period of time permitted by Rule 4(a) of the Federal Rules of Appellate Procedure for an extension of time upon a showing of excusable neglect has long since expired.

In support of its petition for attorneys' fees, defendant has cited three Title VII employment discrimination cases in which successful defendants were awarded attorneys' fees. The instant employment discrimination case, however, was brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. The provisions which grant authority for awards of attorneys' fees in Title VII and in the Age Discrimination in Employment Act of 1967 contain dissimilar language. 42 U.S.C. § 2000e-5(k) allows an award of attorneys' fees to the prevailing party in a Title VII action. *See, Christianburg Garment Co.* v *EEOC*, 434 U.S. 412 (1978). 29 U.S.C. § 216(b), which is incorporated by the enforcement provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b), states that the district court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorneys' fee to be paid by the defendant, and the costs of the action." *See, Monroe* v. *Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D.Ga. 1971); *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974). Hence, while agreeing with defendant that plaintiff's claim is frivolous, unreasonable, and without foundation, the Court finds that, unlike Title VII cases, it has no authority to award attorneys' fees to a successful defendant in a case brought under the Age Discrimination in Employment Act of 1967.



Unlike awards of attorneys' fees, which must generally have statutory authority, the taxation of costs is normally within the sound discretion of the district court. F.R.Civ.P. 54(d). Although 29 U.S.C. § 216(b) does speak to the subject of costs, this provision only takes the matter outside the district court's discretion when a plaintiff is successful. *See, Hayes* v *Bill Haley and his Comets, Inc.*, 274 F.Supp. 34 (E.D.Pa. 1967). Thus, the Court finds that the taxation of costs is within its discretion in cases brought under the Age Discrimination in Employment Act of 1967 when a defendant is successful. Therefore, this Court awards the ordinary costs of this litigation, in the amount of $387.91, to the defendant.

An appropriate Order shall issue.

/s/ Fred W. Kaess
United States District Judge

Dated: September 7, 1978
Detroit, Michigan

## APPENDIX G

### ORDER DENYING PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO FILE APPEAL, DENYING DEFENDANT'S MOTION FOR ATTORNEYS' FEES, AND GRANTING DEFENDANT'S MOTION FOR COSTS

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: September 7, 1978

(William Robert Nolte, Plaintiff, v. The Budd Company, Defendant — No. 75-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Plaintiff's Motion for Extension of Time to File an Appeal, and Defendant's Motion for Attorneys' Fees and Costs having been duly considered by the Court and a decision having been rendered in a Memorandum Opinion of even date herewith;

IT IS ORDERED that Plaintiff's Motion for Extension of Time to File an Appeal be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendant's Motion for Attorneys' Fees be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendant's Motion for Costs be, and hereby is, granted, as follows:

This Court hereby awards the ordinary costs of this litigation in the amount of Three Hundred Eighty-Seven and 91/100 ($387.91) Dollars to the defendant.

/s/ Fred W. Kaess
United States District Judge